

NO. 47536-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

IN THE MATTER OF THE ESTATE OF
ROBERT T. RIDLEY
Deceased.

KIMLY PROM, individually,
Petitioner,

vs.

PHILIP CARVER, as Personal Representative of the Estate of Robert
Ridley; RIVERVIEW COMMUNITY BANK, a Washington Financial
Institution; JENNA SUY and PAULLA SUY, wife and husband and their
marital community comprised thereof;
Respondents

REPLY BRIEF OF APPELLANT KIMLY PROM

Sok-Khieng K. Lim, WSBA #30607
Ingrid McLeod, WSBA #44375
DAVIES PEARSON, P.C.
920 Fawcett Avenue
Tacoma, WA 98402
253-620-1500

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I. REPLY

Mr. Carver and Riverview argue—incorrectly—that they properly raised new issues in their summary judgment reply materials and that the trial court properly granted their summary judgment motions and requests for attorney fees. But the record before this court shows that: (1) Mr. Carver and Riverview improperly inserted new issues and legal theories into their reply materials and that the trial court used those late-raised issues in resolving the summary judgment motions, (2) the trial court misapplied the standards and burdens on summary judgment and summarily dismissed Mr. Carver and Riverview despite multiple genuine issues of material fact, (3) abused its discretion in denying Ms. Prom’s motion for reconsideration, and (4) misinterpreted the legal standard for attorney fee awards under RCW 11.96A.150 and mechanically made unreasonable fee awards to Mr. Carver and Riverview as a litigation afterthought. Thus, this court should reverse and remand for trial.

A. In granting summary judgment in favor of Mr. Carver and Riverview, the trial court committed reversible error because it misapplied the summary judgment standard and erroneously allowed Mr. Carver and Riverview to raise new issues in their summary judgment reply materials and in oral argument.

Mr. Carver and Riverview are asking this court to significantly modify summary judgment procedure and depart from longstanding precedent. They ask this court to re-write the law to permit parties moving for

summary judgment to raise new issues in reply materials—or even at oral argument—and to shift the onus regarding such newly-raised issues to the non-moving party. *Br. of Resp't Carver* at 19-21; *Br. of Resp't Riverview* at 7-9. Because that position is not supported by CR 56 or case law, this court should reject Mr. Carver's and Riverview's arguments regarding raising new arguments on reply.

As a preliminary matter, Riverview argues that the trial court's consideration of and reliance upon issues raised for the first time in their summary judgment reply materials is reviewed under an abuse of discretion standard. *Br. of Resp't Riverview* at 2. Riverview is incorrect and it has not cited any authority that supports its position. *See Br. of Resp't Riverview* at 2. Instead, Riverview attempts to transform authority regarding a trial court's discretion to enter orders that modify the normal *time limits* on summary judgment into authority for the proposition that a trial court has discretion to permit a moving party to raise *new issues* on summary judgment reply. *Br. of Resp't Riverview* at 2; *see also State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236-40, 88 P.3d 375 (2004). Appellate courts review summary judgment decisions de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). As such, this court should review de novo the trial court's decision to permit Mr. Carver and Riverview to raise new issues on reply

and to rely on those newly-raised issues in granting their motions for summary judgment.

In summary judgment motions, the moving party must raise in its opening brief *all* of the issues on which it believes it is entitled to summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991); *R.D. Merrill Co. v. State*, 137 Wn.2d 118, 147, 969 P.2d 458 (1999); CR 56. Then, after the nonmoving party's response, the moving party's reply materials are *limited to documents* that "explain, disprove, or contradict the adverse party's evidence." *White*, 61 Wn. App. at 168-69. If a party moving for summary judgment fails to include all issues in its opening brief, it may strike its motion and re-file a comprehensive motion at a later time or it may bifurcate its summary judgment proceedings and raise the new issues in a subsequent motion for summary judgment. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873 (2014). "[B]ut the moving party cannot prevail on the original [summary judgment] motion based on issues not raised therein." *Id.*

Thus, it is reversible error for the trial court to consider issues raised for the first time in a summary judgment movant's reply materials and to use such newly-raised issues as a basis for granting summary judgment. *White*, 161 Wn. App. at 169; *Admasu*, 185 Wn. App. at 40-41; CR 56(c).

For example, in *White*, a medical malpractice case, the defendants moved for summary judgment and argued that the complaint should be dismissed because the plaintiff lacked any admissible expert testimony regarding the applicable standard of care. 61 Wn. App. at 166.

In responding to the defendants' motion, the plaintiff offered expert evidence regarding the applicable standard of care. *White*, 61 Wn. App. at 166-67. The plaintiff's response materials "did not seek summary judgment or otherwise put into issue the question of proximate cause." *White*, 61 Wn. App. at 169.

Nonetheless, in reply the defendants argued for the first time that the plaintiff had failed to produce any evidence that the defendants' actions proximately caused the plaintiff's injury. *White*, 61 Wn. App. at 167. Still, the trial court considered *all* issues raised by defendants—including the issue of proximate cause that they raised for the first time on reply. *Id.*

Further, in granting the defendants' motion, the trial court "ruled that [the plaintiff] had not set forth specific facts showing there was a genuine issue for trial with regard to the standard of care, with regard to whether the standard of care has been breached, and *whether or not there is any damage as a result of that breach*." *Id.* at 167-86 (internal citations omitted)(emphasis added).

The Court of Appeals held it was error for the trial court to consider on summary judgment issues raised for the first time on reply *and* to rely on such newly-raised issues as a basis for granting summary judgment. *Id.* at 169. Accordingly, the Court of Appeals also declined to consider the issues that the defendants' raised in reply materials on appeal. *Id.*

Here, both Mr. Carver and Riverview argue that the new issues that they raised on reply and at oral argument responded to arguments that Ms. Prom made in her opposition to their summary judgment motions. *Br. of Resp't Carver* at 19; *Br. of Resp't Riverview* at 4-5, 8. Those assertions are not accurate.

Mr. Carver moved for summary judgment of *three* of Ms. Prom's claims, arguing exclusively that Ms. Prom's only evidence violated the deadman's statute. CP at 86-90. Riverview joined in Mr. Carver's motion with no additional argument but sought summary dismissal of *four* of Ms. Prom's claims.¹ CP at 92-93.

Ms. Prom responded by producing extensive evidence in support of her claims that was not barred by the deadman's statute. *See e.g.*, CP at 95-456. But, even though reply materials are *limited to documents* that "explain, disprove, or contradict the adverse party's evidence[.]" *see*

¹ For the court's convenience in reviewing these issues, copies of Mr. Carver's motion for summary judgment and Riverview's joinder are appended to this brief.

supra, the trial court permitted Mr. Carver and Riverview to insert new issues and raise new legal theories on reply.

For example, in response, Ms. Prom argued that Mr. Carver failed to seek summary dismissal of Ms. Prom's claims for replevin, constructive trust, and unjust enrichment and was precluded from arguing those issues into his reply. CP at 98, 112. Mr. Carver replied by inserting a request for summary dismissal of those claims into his reply, arguing that Mr. Ridley's trust—not his Estate—held any funds that Ms. Prom sought to recover and, as such, she could not establish her claims for replevin, constructive trust, or unjust enrichment against the Estate because it does not hold any funds at issue in this case. CP at 468, 470-71. With respect to Riverview, Ms. Prom argued that Riverview had joined Mr. Carver's motion for summary judgment but failed to seek summary dismissal of all of Ms. Prom's claims against it. CP at 98-99, 111-12. Riverview responded by arguing to the court that: “[O]bviously we’re objecting to any claims that apply to the bank. It’s pretty clear by the pleadings that we’re not conceding any, so I don’t think this is a notice issue.” RP at 21 (emphasis added).

Ms. Prom also presented evidence that the second POD account agreement was voidable because it was procured by undue influence, of which Riverview branch manager Collette Tynan had actual knowledge,

and that the readily ascertainable terms of the first POD account agreement should control even though Ms. Tynan had shredded it. CP at 95-125. Riverview responded by raising for the first time the issue of whether it was immune from liability for any and all of its actions here under former chapter 30.22 RCW. CP at 462-64.

Further, Ms. Prom argued *facts* showing that Riverview violated its policies and procedures. CP at 105-09. Riverview replied by raising the new *legal* theory that Ms. Prom lacked standing to assert any claim against it here. CP at 464.

As these examples show, Mr. Carver and Riverview were not responding to evidence presented by Ms. Prom in opposition to their summary judgment motions. Instead, Mr. Carver and Riverview used their reply materials and oral argument to re-frame the legal issues before the trial court on summary judgment, which prejudiced Ms. Prom by depriving her of the opportunity to present a robust response.

Ms. Prom responded to summary judgment motions that focused solely on her first three causes of action and the deadman's statute. CP at 86-90; *see also Br. of Resp't Carver* at 8. But, after considering Mr. Carver's and Riverview's reply materials and oral arguments, the trial court granted summary judgment in favor of Mr. Carver on all claims because Ms. Prom "does not allege that Mr. Carver or Mr. Ridley

wrongfully caused any of her damages, or that any money she claims ended up in the Estate. She therefore fails to establish a claim against Carver.” CP at 558. Similarly, the trial court granted summary judgment in favor of Riverview on all claims because it concluded that chapter 30.22 RCW insulated Riverview from any of Ms. Prom’s claims and that Ms. Prom lacked standing to assert her claims against Riverview. CP at 559.

Thus, the rationale behind the trial court’s summary judgment orders originated in Mr. Carver’s and Riverview’s *reply* materials. *See* CP at 462-73. The trial court’s reliance on Mr. Carver’s and Riverview’s late-raised issues compounds its error in permitting them to raise new issues, requests, and legal theories on reply such that reversal of the summary judgment orders is required.

B. *Because the trial court modified the summary judgment standard and ignored multiple genuine factual disputes—including several conceded by Mr. Carver and Riverview, this court should reverse and remand for trial.*

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960).

Summary judgment may be appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In reviewing summary judgment motions, Washington courts consider all facts and reasonable inferences from the facts in the light most favorable to the non-moving party. *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 840-41, 28 P.3d 802 (2001). Summary judgment is not appropriate if the facts or inferences therefrom create any question of material fact. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). Further, “[a]ny doubt as to the existence of a genuine issue of material fact is resolved against the moving party” and in favor of the non-moving party. *Atherton Condo. Apartment-Owners Ass’n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Summary judgment is inappropriate “if the record shows any reasonable hypothesis [that] entitles the nonmoving party to relief.” *Mostrum v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

Here, the trial court appears to have considered the evidence and inferences in the light *least* favorable to Ms. Prom and also improperly overlooked multiple genuine factual disputes and concessions by Mr. Carver and Riverview. For example, Ms. Prom either established *or* presented evidence that, when considered in the light most favorable to her, creates genuine factual disputes regarding: (1) whether Mr. Ridley

signed the first POD account agreement, which identified both Ms. Prom and Ms. Suy as its beneficiaries; (2) whether Ms. Suy procured the second POD account agreement through exercise of undue influence such that it should be voided; and (3) whether Riverview had actual knowledge of Ms. Suy's undue influence in procuring the second POD account agreement such that it improperly distributed the funds in Mr. Ridley's checking account under its terms.

First, Mr. Carver conceded for purposes of summary judgment that Mr. Ridley executed the first POD account agreement. At oral argument, his counsel acknowledged:

. . . I know there's evidence in the record . . . [that Mr. Ridley] told some people that he was going to put a . . . payable on death on that account for Jenna Suy and Kimly Prom. . . . And he went so far, apparently, as to prepare . . . or have the bank prepare an account agreement for him with both Kimly Prom and Jenna Suy on it as POD beneficiaries.

RP at 5. He further agreed that, for purposes of summary judgment, the court could assume that Mr. Ridley had signed that first POD account agreement. CP at 469. Based on this concession, Ms. Prom's claims against the Estate have traction under the rationale presented in Mr. Carver's motion for summary judgment, where he argued that *if* Ms. Prom was a POD beneficiary of Mr. Ridley's checking account, she may prevail on her claims against the Estate. *See* CP at 87. But the trial court ignored

the parties' consensus that Mr. Ridley had signed the first POD account agreement, which named both Ms. Prom and Ms. Suy as POD beneficiaries of his checking account. *See e.g.*, CP at 131-44, 254-59, 451, 445, 463; RP at 5.

Second, the trial court ignored evidence that presented—at a minimum—a genuine factual dispute over whether Ms. Suy procured the second POD account agreement through undue influence such that it should be voided. For example, the record shows that: (1) Ms. Suy and Mr. Ridley had a longstanding, parent-child-like relationship, with Ms. Suy calling him “dad”; (2) Mr. Ridley relied upon Ms. Suy and her husband to provide the majority of his necessary around-the-clock care during his final illness, with Ms. Suy caring for Mr. Ridley for approximately eight-hours every day and her husband caring for him overnight; (3) Ms. Suy alone helped Mr. Ridley with his finances and bill paying; (4) in Mr. Ridley’s final days, checks were drawn on his Riverview checking account for \$10,000 *each* to Ms. Suy, her husband, and her two sons; (5) shortly before his death, Mr. Ridley’s Mercedes Benz was transferred to Ms. Suy; and (6) Ms. Suy was the driving force behind execution of the second POD account agreement, which designated her as the sole POD beneficiary of Mr. Ridley’s Riverview checking account. CP at 129-43, 445, 254-59, 262-63, 450-51; 534-38.

Because all facts and inferences therefrom must be taken in favor of Ms. Prom on summary judgment, Ms. Prom presented evidence sufficient to establish a presumption that Ms. Suy procured the second POD account agreement through undue influence under *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013). *See also In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998); *Estate of Randmel v. Pounds*, 38 Wn. App. 401, 405-06, 685 P.2d 638 (1984); *Estate of Haviland*, 162 Wn. App. 548, 558-59, ¶¶24-25, 255 P.3d 854 (2011). Specifically, Ms. Prom presented evidence showing that Ms. Suy and Mr. Ridley had a confidential relationship because of their familial-like relationship and Mr. Ridley's reliance on Ms. Suy (and her husband) for the majority of his around-the-clock care. Ms. Prom presented undisputed evidence that Ms. Suy actively participated in the procurement of the second POD account agreement; indeed, it is undisputed that Ms. Suy's conduct spurred Mr. Ridley to change course and designate her as the sole POD beneficiary of his checking account. Additionally, as the sole POD beneficiary of Mr. Ridley's checking account, Ms. Suy's received a disproportionately large gift from Mr. Ridley's *Estate*—as opposed to the trust. Further, Ms. Suy received a gift disproportionately larger than any other individual—as opposed to charitable beneficiaries, with Mr. Ridley's family members receiving only \$10,000 to \$50,000 each. CP at 209.

These facts and the inferences from these facts, especially when considered in the light most favorable to Ms. Prom, as required here, give rise to a presumption of undue influence, which neither Mr. Carver nor Riverview successfully rebutted. CP 462-72.

Further, even without the benefit of the un rebutted presumption of undue influence, the evidence presented by Ms. Prom, when considered in the light most favorable to her, makes it highly probable that Ms. Suy procured the second POD account agreement through undue influence. Thus, Ms. Prom's claim that the second POD account agreement should be voided because it was procured by undue influence is not susceptible to summary judgment. *See e.g., Estate of Haviland*, 162 Wn. App. at 558-59. Instead, because the second POD account agreement should be voided based on Ms. Suy's undue influence, the first POD account agreement—which the parties concede was signed by Mr. Ridley and identified Ms. Prom as a POD beneficiary—should control disposition of the funds in Mr. Ridley's checking account and necessarily gives Ms. Prom standing to challenge Riverview's unauthorized and improper actions.

Third, summary judgment in favor of Riverview was not appropriate because Ms. Prom presented evidence that, when taken in the light most favorable to Ms. Prom, shows that its branch manager, Collette Tynan had actual knowledge that the second POD account agreement was

procured through undue influence. *See* CP at 131-35, 261-63. As a Riverview manager, Ms. Tynan's actual knowledge is imputed to Riverview. With actual knowledge that the second POD account agreement was procured through undue influence, former RCW 30.22.120 did not entitle Riverview to rely with impunity on the terms of that second POD account agreement in distributing all funds in Mr. Ridley's checking account to Ms. Suy.² *See Estate of Brownfield ex rel. Schneider v. Bank of America, N.A.*, 170 Wn. App. 553, 562-63, 285 P.3d 886 (2012).

Consequently, the trial court erred by ignoring the evidence produced by Ms. Prom that established—or created genuine factual questions—regarding her claims against Mr. Carver and Riverview. The trial court further erred by shifting the burdens on summary judgment and, apparently, considering the evidence presented in the light *least* favorable to Ms. Prom. Thus, this court should reverse the trial court's orders summarily dismissing Mr. Carver and Riverview and should remand for trial.

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² Additionally, although not the focus of Mr. Carver's or Riverview's briefing or the litigation below, Mr. Carver alleges that Mr. Ridley essentially ratified the second POD account agreement and Riverview's improper actions by *stating* to his estate planning attorney "just leave it the way it is." *Br. of Resp't Carver* at 7. But Mr. Carver can offer only attorney Sam Gunn's testimony regarding *statements* made by Mr. Ridley for the truth of the matter asserted, making such alleged statements inadmissible hearsay. *See* ER 801-804. Thus, that factual assertion should not be considered.

C. *The trial court's errors in granting summary judgment were compounded by the trial court's perfunctory denial of Ms. Prom's motion for reconsideration further supports reversal and remand for trial.*

As discussed above, the trial court permitted Riverview to raise new issues and requests for relief on reply and at oral argument, relied on those newly-raised issues in summarily dismissing Riverview from the case, and ignored clear factual disputes regarding Riverview's actual knowledge of the dispute arising out of Ms. Suy's exercise of undue influence to procure the second POD account agreement. *See supra*. In doing so, the trial court improperly modified the burden on summary judgment. *See supra*.

Although Ms. Prom asserted these arguments in her motion for reconsideration—and Riverview failed to provide any substantive response, only stating that it would not repeat its prior arguments, the trial court precipitously denied that motion. CP at 560-575, 591-93. Indeed, in ruling on Ms. Prom's motion for reconsideration, the trial court declined oral argument and stated: "It was issues that we had discussed earlier, and therefore I deny the motion for reconsideration." RP at 30. Thus, Riverview is incorrect that Ms. Prom had a full and fair opportunity to litigate the issues that it raised for the first time on reply.

In light of the gravity of the trial court's errors in summarily dismissing Riverview from the case, even under the more lenient abuse of

discretion standard governing Ms. Prom's appeal of the trial court's denial of her motion for reconsideration, this court should still reverse and remand for trial.

D. *The trial court erred by conflating the discretionary, equitable principles of RCW 11.96A.150 with a mandatory, prevailing party standard and abused its discretion in entering fee awards in favor of Mr. Carver and Riverview.*

As a threshold matter, Mr. Carver argues that Ms. Prom relies too extensively on the recent Court of Appeals, Division I case *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2014), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). *Br. of Resp't Carver* at 24. Mr. Carver is incorrect. Ms. Prom cited *Berryman* only twice in her opening brief and both of her citations to *Berryman* are accompanied by a citation to additional authority, including *Mahler*³ and *Absher*.⁴ *Br. of Appellant* at 42-43. But even if Ms. Prom had relied more heavily on *Berryman* in her opening brief, such reliance would be well-grounded, because—before even addressing the multiplier issue—the *Berryman* Court outlined in detail the current law with respect to a trial court's duty to actively analyze

³ *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 305 (1998).

⁴ *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995).

and calculate attorney fee awards in, which Mr. Carver acknowledges is instructive.⁵ 177 Wn. App. at 656-65; *Br. of Resp't Carver* at 24.

In making awards of attorney fees, the trial court “must articulate the grounds for the award, making a record sufficient to permit meaningful review.” *White v. Clark Cnty.*, -- Wn. App. --, ¶40, 354 P.3d 38 (2015). In order to make an adequate record for review, the trial court normally must enter detailed findings of fact and conclusions of law that sufficiently permit an appellate court to “determine why the court awarded the amount in question.” *Clark Cnty.*, -- Wn. App. at ¶40. The findings also “must show how the court resolved disputed issues of fact and the conclusions must explain the court’s analysis.” *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013). It may be reversible error for a trial court to make an award of attorney fees without conducting a *lodestar* analysis on the record and specifically articulating how it calculated the sum awarded because, absent this information, the record may be insufficient to permit appellate review of the trial court’s analysis. *Id.* at ¶¶41-42.

Here, the trial court incorrectly treated RCW 11.96A.150 as a mandatory, prevailing party fee statute. Instead, RCW 11.96A.150 leaves Washington courts with broad *equitable* discretion to deny requests for

⁵ As in *Berryman*, the judge who entered the orders being reviewed is no longer serving on the superior court and remand to the trial court for it to fulfill its “traditional role of resolving disputed facts and exercising suitable discretion” with respect to calculation of any attorney fee awards is the appropriate remedy. See 177 Wn. App. at 659-60.

attorney fees for any reason that the court deems reasonable and appropriate. *Estate of Stover*, 178 Wn. App. 579, 587, 315 P.3d 579 (2013). Thus, even though RCW 11.96A.150 gives courts discretion to make attorney fee awards, the trial court here erred as a matter of law by reading RCW 11.96A.150 as requiring awards of attorney fees in favor of a prevailing party. As such, this court should reverse the trial court's attorney fee awards in favor of Mr. Carver and Riverview.

Additionally, even if this court does not wholly reverse the trial court's fee awards, this court should remand for recalculation of such awards because the trial court failed to consider Mr. Carver's and Riverview's requests for attorney fees—and Ms. Prom's objections to those requests—on the record. RP at 35-40. Although the trial court did enter findings of fact and conclusions of law with respect to both Mr. Carver's and Riverview's requests, those findings and conclusions are insufficient to permit review of its analysis. *See* CP at 649-56. Indeed, the findings and conclusions do not even permit review of whether or not the trial court analyzed Ms. Prom's multiple objections to Mr. Carver's and Riverview's fee requests. *See* CP at 594-600, 603-10, 649-56.

Moreover, the trial court adopted Riverview's proposed findings and conclusions whole cloth with no interlineations whatsoever and found generically only that the hourly rates and hours billed were reasonable.

CP at 653-55. Further, even though the trial court did reduce the hourly rate charged by one of Mr. Carver's attorneys from \$375 to \$300, the trial court provided no explanation or analysis of its decision to make this change. CP at 649-52. Thus, the record before this court is insufficient to permit this court's review of the trial court's analysis and remand is required.

E. This court should deny Mr. Carver's and Riverview's requests for attorney fees on appeal and, instead, should award Ms. Prom her reasonable appellate attorney fees.

As set forth above, this court should reverse the trial court's erroneous orders regarding Mr. Carver and Riverview and remand for trial and should decline to award them any attorney fees on appeal. Even assuming, however, that this court were to affirm any of the orders before it, equity still weighs against imposing personal liability on Ms. Prom for any of Mr. Carver's or Riverview's appellate attorney fees because this appeal presents—at a minimum—nuanced and debatable issues regarding the standards and burdens on summary judgment and undue influence. Instead, because many of the issues on appeal could have been avoided had Mr. Carver and Riverview simply followed proper summary judgment procedure, equity weighs in favor of awarding Ms. Prom her reasonable attorney fees on appeal under RAP 18.1 and RCW 11.96A.150, as requested in Ms. Prom's opening brief.

II. CONCLUSION

The trial court erred by allowing Mr. Carver and Riverview to raise new issues on reply and in oral argument *and* then relied on those new issues in entering summary judgment in their favor, misapplied the summary judgment standards and burdens, ignored multiple genuine factual disputes and concessions by Mr. Carver and Riverview, and misinterpreted the law. Thus, this court should reverse the orders granting summary judgment in favor of Mr. Carver and Riverview and should remand for trial.

Because the trial court's errors were so egregious, this court should further hold that the trial court abused its discretion in denying Ms. Prom's motion for reconsideration of the trial court's summary dismissal of Riverview.

Further, because the trial court misinterpreted RCW 11.96A.150 as a mandatory, prevailing party standard—rather than an equitable standard—and then, as a litigation afterthought, awarded Mr. Carver and Riverview substantial sums in attorney fees in costs without conducting a *lodestar* analysis and without actively analyzing the reasonable, compensable amount of such awards or making a record of how it analyzed Ms. Prom's objections to Mr. Carver's and Riverview's requested fees, this court

should reverse the attorney fee and cost awards in favor of Mr. Carver and Riverview.

Lastly, this court should exercise its discretion and award Ms. Prom her reasonable attorney fees on appeal.

DATED this 18th day of September 2015.

DAVIES PEARSON, P.C.

A handwritten signature in black ink, appearing to read "Ingrid McLeod", is written over a horizontal line.

SOK-KHENG K. LIM, WSBA #30607

INGRID McLEOD, WSBA #44375

Attorneys for Kimly Prom

CERTIFICATE OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this 18th day of September 2015, a true copy of this document was served via e-mail and/or U.S. Mail on:

Jan K. Kitchel
Cable Huston
1001 SW 5th Ave., #2000
Portland, OR 97204
Attorney for Personal Representative of the Estate of Robert Ridley

Steve Leatham
HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.
211 E. McLoughlin Blvd., #100
P.O. Box 611
Vancouver, WA 98666-0611
Attorney for Riverview Community Bank

Jenna Suy
1918 N.E. 94th Ct.
Vancouver, WA 98664
Pro Se Respondent (U.S. Mail only)


KATHY BATES
Legal Assistant

in / s:\2xxxx\21xxx\215xx\21513\1\appeal 2\reply br. of appellant (september 2015).doc

APPENDIX

CP at 86-94

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FILED
2014 SEP 10 AM 10:04
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

IN THE MATTER OF THE ESTATE

OF

ROBERT T. RIDLEY,

Deceased.

No. 13-4-00969-3

**CARVER'S MOTION FOR
SUMMARY JUDGMENT**

KIMLY PROM, individually,

Petitioner,

v.

PHILIP CARVER, as Personal Representative
of the Estate of Robert Ridley, RIVERVIEW
COMMUNITY BANK, a Washington
Financial Institution, JENNA SUY and
PAULLA SUY, wife and husband and their
marital community comprised thereof,

Respondents.

Respondent Philip Carver moves this Court for summary judgment on all of
petitioner's claims against Carver and the Estate of Robert Ridley. Carver relies on the
attachments to this motion, the following memorandum of facts and law, and on the
pleadings already on file in this case.

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Summary

Petitioner is disappointed that she was not named a beneficiary of Ridley's checking account. Petitioner has no admissible evidence to support her claims. She claims that the deceased, Robert Ridley, promised to leave her money by way of a "Payable on Death" (POD) bank account, but she has only her own testimony, and no documents. She was not the payee on any such account when Mr. Ridley died.

Petitioner's Claims

Petitioner's first claim is to rescind the checking account that existed at Ridley's death, and to substitute an alleged account that Ridley never approved or signed.

Her second claim is to shift funds from a trust account back into a checking account.

Her third claim is to shift funds from a trust account back into the checking account.

Her fourth claim apparently is to recoup money paid to her sister, respondent Jenna Suy, the actual POD beneficiary of the account.

Her fifth claim is to assert a constructive trust over money her sister received.

Her sixth claim is replevin of the funds her sister received.

Her tenth claim (actually the seventh asserted in the petition) is conversion against her sister.

Her eleventh claim (actually the eighth asserted in the petition) is unjust enrichment against her sister.

Apparently, only the first three claims might implicate the Estate of Ridley. All claims against the Estate require, first, that there was a POD account naming petitioner at the time of Ridley's death. There wasn't, and there never was.

Facts

Simply stated, petitioner claims that Ridley orally promised to give Prom POD status on a \$500,000 checking account along with POD beneficiary Jenna Suy. No one else heard this alleged conversation. Petitioner has no documents to show that such a POD account ever

1 was established. When Ridley died, the only account with a POD beneficiary named Jenna
2 Suy and no one else.

3 Prom claims that she heard Ridley say to Sam Gunn (Ridley's attorney) and Colette
4 Tynan (from Riverview Bank) that he wanted to give Prom \$250,000 in a POD account.
5 Prom Depo p. 7. Prom does not know if her name ever was on the account. Prom Depo pp.
6 8, 11. She never saw such an account record. Prom Depo p. 6.

7 Tynan testified that Ridley told her he was thinking about putting both sisters on the
8 account. Tynan Depo pp. 18-19. When it came time to sign the account card, however, he
9 did not want Prom on the account. Tynan Depo p. 19. A draft account agreement may have
10 been created, but it no longer exists and never was signed by Ridley. Tynan Depo pp. 26-7.

11 Sam Gunn set up Ridley's trust and was involved in funding a trust bank account
12 (with no POD designees) from Ridley's checking account. Gunn Depo pp. 17, 21.

13 Attorney Sam Gunn confirmed that neither Prom, nor Suy, nor Tynan ever discussed
14 with him a POD status on the checking account for Prom or Suy prior to the funding of the
15 trust bank account from the checking account. Gunn Depo pp. 49-50. Gunn met with
16 Ridley after Suy was given POD status, and after monies had gone out of and back into the
17 checking account, and he asked Ridley what he wanted to do with the account, and he said,
18 "just leave it the way it is." Gunn Depo pp. 24-6, 55-6. Ridley expressed no wish to have
19 another POD or to put more money in the account. No one ever informed Gunn that Ridley
20 wanted Prom on the account as a POD beneficiary. Gunn Depo p. 59.

21 Legal Analysis

22 Petitioner's assertions of Ridley's purported oral promise or agreement are barred by
23 Washington's "Deadman Statute." Washington's Deadman Statute prohibits a party in
24 interest from testifying on his or her own behalf as to any transaction with a decedent or any
25 statement made to the person by the decedent:

26 ///

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2 " . . . that in an action or proceeding where the adverse party sues or defends as
3 executor, administrator or legal representative of any deceased person ... then
4 a party in interest or to the record, shall not be admitted to testify in his or her
own behalf as to any transaction had by him or her with, or any statement
made to him or her, or in his or her presence, by any such deceased. . . ."

5 RCW 5.60.030.

6 The purpose of the Deadman Statute is to prevent interested parties from giving self-
7 serving testimony about conversations or transactions with the deceased. *McGugart v.*
8 *Brumback*, 77 Wash.2d 441, 444, 463 P.2d 140 (1969). The matter about which the
9 interested person is testifying must involve some act by and between the person and the
10 decedent for the benefit or detriment of one or both of the parties. *Bentzen v. Demmons*, 68
11 Wash.App. 339, 344, 842 P.2d 1015 (1993).

12 To determine whether a person is a "party in interest" a court asks whether the person
13 will gain or lose in the action. *Bentzen*, 68 Wash.App. at 344. The person's interest must be
14 a direct and certain interest in the outcome of the action. *In re Estate of Miller*, 134
15 Wash.App. 885, 893, 143 P.3d 315 (2006). Prom is an interested party.

16 The term "transaction" as used in the statute is broadly defined as "the doing or
17 performing of some business between parties, or the management of any affair." *Bentzen*, at
18 344. The test of a "transaction" is whether the deceased, if living, could contradict the
19 witness of his or her own knowledge. *In re Estate of Lennon*, 108 Wash.App. 167, 174-175,
20 29 P.3d 1258 (2001). If a person testifies as to a personal transaction with the decedent and
21 such testimony shows either what did or did not take place between the parties, the testimony
22 must be excluded. *In re Estate of Lennon*, 108 Wash.App. at 175.

23 Additionally, a person cannot testify indirectly to create an inference as to what did or
24 did not transpire between the parties. *In re Estate of Miller*, 134 Wash.App. at 891.

25 Prom is barred from testifying that she heard a promise or agreement from Mr. Ridley
26 to leave her money.


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Conclusion

Petitioner cannot prove with any admissible evidence that she had POD status on Ridley's account at the time of his death (or at any time), nor can she prove that he ever promised to give her that status, or any amount of money. The Court should grant Carver's motion.

Dated this 8 day of September, 2014.

CABLE HUSTON, LLP

By: 
Jan K. Kitchel, WSBA No. 13705
Facsimile: 503.224.3176
Attorneys for Philip Carver, Personal Representative

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of September, 2014, I caused to be served a true copy of the foregoing **CARVER'S MOTION FOR SUMMARY JUDGMENT** on the following parties at the following addresses:

Sok-Khieng K. Lim
Davies Pearson, PC
920 Fawcett
PO Box 1657
Tacoma, WA 98401-1657
Facsimile: (253) 572-3052
E-Mail: slim@dpearson.com
Attorneys for Petitioner

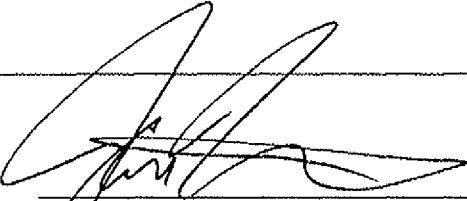
Brian Robert Heurlin
Stephen Leatham
Heurlin Potter Jahn Leatham Holtmann
& Stoker P.S.
211 E. McLoughlin Blvd Ste 100
PO Box 611
Vancouver, WA 98666-0611
Facsimile: (306) 750-7548
E-Mail: brh@hpl-law.com
Attorneys for Riverview Community Bank

Jenna and Paulla Suy
1918 NE 94th Court
Vancouver, WA 98664
Pro Se Respondents

by:

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U.S. Postal Service, ordinary first class mail
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electronic service
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Jan K. Kitchel, WSBA #13705
4830-0956-7518, v. 1

FILED

2014 SEP 25 AM 11:29

SCOTT G. WEBER, CLERK
CLARK COUNTY

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

IN THE MATTER OF THE ESTATE OF)
ROBERT T. RIDLEY,) NO. 13-4-00969-3
Deceased.) RIVERVIEW COMMUNITY BANK'S
JOINDER IN CARVER'S MOTION FOR
SUMMARY JUDGMENT
KIMLY PROM, individually,)
Petitioner,)
v.)
PHILIP CARVER, et al.,)
Respondents.)

ORIGINAL

Respondent Riverview Community Bank ("Riverview") hereby joins in respondent Philip Carver's motion for summary judgment of dismissal.

Only the first four claims for relief in the petition even arguably seek to impose liability upon Riverview. For the reasons set forth in Carver's motion for summary judgment, arguments in which Riverview hereby joins, Riverview is also entitled to an order dismissing all of petitioner's claims against it.

DATED this 24 day of September, 2014.

RIVERVIEW COMMUNITY BANK'S JOINDER IN
CARVER'S MOTION FOR SUMMARY - 1

Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611

0-000000092

1 HEURLIN, POTTER, JAHN, LEATHAM,
2 HOLTMANN & STOKER, P.S.

3 

4 Stephen G. Leatham, WSBA #15572
5 Of Attorneys for Respondent Riverview
6 Community Bank
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RIVERVIEW COMMUNITY BANK'S JOINDER IN
CARVER'S MOTION FOR SUMMARY - 2

Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611

0-000000093

CERTIFICATE OF SERVICE

I certify that I caused the foregoing RIVERVIEW COMMUNITY BANK'S JOINDER
IN CARVER'S MOTION FOR SUMMARY JUDGMENT to be served on the following:

Sok-Khieng K. Lim
Davies Pearson PC
920 Fawcett Ave
PO Box 1657
Tacoma WA 98401-1657
slim@dpearson.com

Of Attorneys for Petitioner

☒ By U.S. Mail
☐ By Facsimile
☐ By Courier
☐ By Electronic Mail
☐ By Overnight Delivery

Jan K. Kitchel
Cable Huston LLP
1001 SW 5th, Suite 2000
Portland, OR 97204
jkitchel@cablehuston.com

Of Attorneys for Respondent

Philip Carver

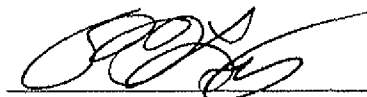
☒ By U.S. Mail
☐ By Facsimile
☐ By Courier
☐ By Electronic Mail
☐ By Overnight Delivery

Jenna and Paulla Suy
1918 NE 94th Ct
Vancouver WA 98664
Pro Se Respondents

☒ By U.S. Mail
☐ By Facsimile
☐ By Courier
☐ By Electronic Mail
☐ By Overnight Delivery

by delivery as indicated above of a true copy to the foregoing on the 24 day of September,
2014.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondent Riverview
Community Bank

CERTIFICATE OF SERVICE

Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611

(3) 0-000000094

DAVIES PEARSON PC

September 18, 2015 - 2:22 PM

Transmittal Letter

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Court of Appeals Case Number: 47536-7

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imcleod@dpearson.com

kbates@dpearson.com

jwaterman@dpearson.com